CALIFORNIA LAW REVISION COMMISSION
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February 14, 1997

Date: February 27, 1997	*Place:* Sacramento
Feb. 27 (Thursday) 9:00 am – 5:00 pm	State Capitol, Room 2040
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. **If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.**	
Most Commission meeting materials are available on the Internet at: `http://www.clrc.ca.gov`	

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

1. MINUTES OF JANUARY 24, 1996, MEETING (sent 2/7/97)

2. ADMINISTRATIVE MATTERS

   Report of Executive Secretary

3. 1997 LEGISLATIVE PROGRAM

   Status of Bills
   Memorandum 97-5 (NS) (to be sent)

4. ENVIRONMENTAL LAW — STATUTE CONSOLIDATION (STUDY E-100)

   Organization of Study
   Memorandum 97-6 (NS) (to be sent)

5. ASSIGNMENT FOR BENEFIT OF CREDITORS (STUDY D-400)

   Organization of Study
   Memorandum 97-7 (SU) (to be sent)

6. INHERITANCE BY FOSTER CHILD OR STEPCHILD (STUDY L-659)

   Draft of Tentative Recommendation
   Memorandum 97-9 (RM) (sent 1/31/97)

7. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (STUDY K-410)

   Memorandum 97-10 (BG) (to be sent)

8. ADMINISTRATIVE LAW

ADMINISTRATIVE ADJUDICATION (STUDY N-116)

Special Order of Business 1:00 pm

Telephone Hearings
Memorandum 97-14 (NS) (sent 2/14/97)

JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

Local Agency Issues
Memorandum 97-11 (RM) (sent 1/31/97)
[Note: This replaces Memorandum 97-2 and its 1st Supplement]

ADMINISTRATIVE RULEMAKING (STUDY N-300)

Interpretive Guidelines
Memorandum 97-12 (NS) (sent 2/13/97)

Rulemaking Procedure
Memorandum 97-13 (NS) (sent 2/14/97)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
FEBRUARY 27, 1997
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on February 27, 1997.

Commission:

Present: Allan L. Fink, Chairperson
Christine W.S. Byrd, Vice Chairperson
Dick Ackerman, Assembly Member
Quentin L. Kopp, Senate Member

Absent: Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Arthur K. Marshall
Edwin K. Marzec
Sanford Skaggs
Colin Wied

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Robert J. Murphy, Staff Counsel

Consultants: Michael Asimow, Administrative Law
Gregory L. Ogden, Administrative Law

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento
Tom Cadell, Division of Labor Standards Enforcement, San Francisco
Jim Deeringer, State Bar Estate Planning, Trust and Probate Law Section, Sacramento
Dorothy Dickey, Coastal Commission, San Francisco
Karl Engeman, Office of Administrative Hearings, Sacramento
Joan Eubanks, Regulations, Department of Motor Vehicles, Sacramento
Dugald Gillies, Sacramento Nexus, Sacramento
Louis Green, County Counsels' Association of California, Placerville
Heather Halsey, Hastings Public Law Research Institute, San Francisco

K. Sue Hummel, Attorney, Roseville
Gerald James, Association of California State Attorneys and Administrative Law Judges, Professional Engineers in California Government, and California Association of Professional Scientists, Sacramento
Jason Kaune, Hastings Public Law Research Institute, San Francisco
Ron Kelly, Berkeley
Gene Livingston, Livingston & Mattesich, Sacramento
Charlene Mathias, Office of Administrative Law, Sacramento
Tim McArdle, California Unemployment Insurance Appeals Board, Sacramento
Julie Miller, Southern California Edison, Rosemead
Dana Mitchell, Senate Judiciary Committee Counsel, Sacramento
Lucy Quacinella, Western Center on Law and Poverty, Northern California Office, Sacramento
Dick Ratliff, California Energy Commission, Sacramento
Madeline Rule, Legal Office, Department of Motor Vehicles, Sacramento
Elizabeth Saviano, California Primary Care Association, Sacramento
Daniel L. Siegel, Attorney General's Office, Sacramento
Shannon Sutherland, California Nurses Association, Sacramento

CONTENTS

Minutes of January 24, 1997, Commission Meeting 3
Administrative Matters 3
Schedule of Future Meetings 3
Meeting Attendance 3
Report of the Executive Secretary 3
1997 Legislative Program 5
Status of Bills 5
Administrative Adjudication by Quasi-Public Entities 5
Best Evidence Rule 5
Mediation Confidentiality 5
Tolling Statute of Limitations when Defendant Is Out of State 5
Homestead Exemption 6
Study E-100 – Environmental Law 6
Study K-401 – Mediation Confidentiality 6
Study K-410 – Confidentiality of Settlement Negotiations 7
Study K-501 – Best Evidence Rule 8
Study L-659 – Inheritance by Foster Child or Stepchild 8
Study N-112 – Administrative Adjudication by Quasi-Public Entities 9
Study N-116 – Administrative Adjudication: Telephone Hearings 9
Study N-200 – Judicial Review of Agency Action 9
Study N-300 – Administrative Rulemaking 16

A quorum of the Commission not being present at the meeting, decisions reported in these Minutes are subject to ratification at a subsequent meeting,

subject to the following actions taken pursuant to the Commission's rules of practice and procedure:

(1) *Decisions on legislative program.* Decisions concerning the legislative program should be implemented pursuant to acting authority of the Chairperson and Vice Chairperson.

(2) *Nonfinal action.* The Chairperson determined, the Vice Chairperson concurring, that a quorum not otherwise being established at the meeting, the members present constituted a quorum acting as a subcommittee for the purpose of taking the nonfinal action of circulating for comment the tentative recommendations on inheritance by a foster child or stepchild (Study L-659) and confidentiality of settlement negotiations (Study K-410).

MINUTES OF JANUARY 24, 1997, COMMISSION MEETING

The Minutes of the January 24, 1997, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Schedule of Future Meetings

The Commission rescheduled the May 8 meeting to May 1 and 2 in Sacramento in order to provide time to consider matters relating to the Public Utilities Code revision.

Meeting Attendance

Noting the continuing problem in achieving a quorum, the Commission decided that the Chairperson will send a letter to all non-legislative Commission members emphasizing the importance of regular attendance at Commission meetings.

Report of the Executive Secretary

The Executive Secretary reported on the following matters.

Public Utilities Code revision. The draft report on revision of the Public Utilities Code prepared by the Public Utility Commission for consultation with the Law Revision Commission is expected on March 31, 1997. Law Revision Commission staff will analyze the report and seek public comment for consideration beginning at the May 1-2, 1997, Law Revision Commission meeting.

Trial court unification. Commission consideration of this study continues to be deferred while the Executive Secretary tries to develop a working relationship with the Judicial Council on it.

Eminent Domain and Inverse Condemnation. Professor Gideon Kanner, a former Commission consultant in the fields of eminent domain and inverse condemnation, has indicated to the Executive Secretary that there are problems in both fields the Commission should address.

The problems in the eminent domain field are fairly minor and ought to be easily addressed. The Executive Secretary indicated that Commissioner Skaggs has in the past also noted the existence of issues that should be dealt with. The Commission directed the staff to receive all the suggestions and work them into the Commission's agenda on a low priority basis.

With respect to inverse condemnation, Professor Kanner indicated that the problems are more significant and that he would be willing to prepare a scholarly research paper if the Commission is interested. The problems he is concerned about relate to procedural impediments to filing an inverse condemnation action. A case involving this matter is currently pending before the United States Supreme Court.

The Executive Secretary noted that the Commission's concurrent resolution would drop inverse condemnation from the Commission's agenda because just compensation issues are constitutional rather than statutory. Procedural elements of inverse condemnation may be statutory to some extent and relate to exhaustion of administrative remedies. The Commission accepted Professor Kanner's offer and will consider the matter under its authority to study administrative law.

Hastings Public Law Research Institute. The Executive Secretary introduced Hastings law students Heather Halsey and Jason Kaune. Ms. Halsey and Mr. Kaune are members of the Hastings Public Law Research Institute and are assisting Assembly Member Ackerman in the analysis of staff materials.

Law Reform Commission of British Columbia. The Executive Secretary noted the passing of the Law Reform Commission of British Columbia. The Law Reform Commission was similar in size and purpose to the California Law Revision Commission. It had done outstanding work in law reform.

1997 LEGISLATIVE PROGRAM

The Commission considered Memorandum 96-5 and its First and Second Supplements, relating to the Commission's 1997 legislative program.

Status of Bills

The Executive Secretary supplemented the chart attached to the memorandum with the following information.

- Senate Judiciary Committee review of SB 68 (Kopp), relating to administrative adjudication by quasi-public entities, was deferred until April 8 in order to amend other provisions into the bill.
- Senator Calderon has introduced the administrative law judge Code of Ethics recommendation as SB 653.
- Assembly Member Ackerman has introduced the recommendations relating to real property covenants (repeal of the First Rule in Spencer's Case and elimination of obsolete restrictions) as AB 707.
- Assembly Member Ackerman has agreed to author the recommendation on attachment by undersecured creditors. This may be combined with a State Bar proposal on a related topic.

Administrative Adjudication by Quasi-Public Entities

Commission action to amend SB 68 (Kopp) is reported in these Minutes under Study N-112.

Best Evidence Rule

Commission action on SB 177 (Kopp) is reported in these Minutes under Study K-501.

Mediation Confidentiality

Commission action to revise the recommendation on mediation confidentiality is reported in these Minutes under Study K-401.

Tolling Statute of Limitations when Defendant Is Out of State

The Commission decided not to reintroduce its recommendation on tolling the statute of limitations when the defendant is out of state. As a low priority, the staff will draft proposed language to amend Code of Civil Procedure Section 351, rather than repeal it, to codify existing case law and resolve other identified problems.

Homestead Exemption

The Commission decided to revisit the recommendation on the homestead exemption in light of a recent Ninth Circuit decision (Jones v. Heskett & Kelleher Lumber Co.). As a low priority, the staff will investigate how best to resolve technical problems in the application of statutory homestead law.

STUDY E-100 – ENVIRONMENTAL LAW

The Commission considered Memorandum 97-6, relating to the organization of the environmental law consolidation study.

The Commission decided to develop an outline of a California Environmental Code. For this purpose, it approved the contracts with the academic consultants described in the memorandum.

The Commission will circulate the outline to interested persons, organizations, entities, and agencies for comment, prefaced by the Mission Statement set out in the memorandum. The language "This is a nonsubstantive project," should be replaced with "This is not a policy revision."

The request for comments should include an inquiry as to (1) whether the project is desirable, (2) whether the outline is sound, (3) whether the contents identified in the outline are correct, and (4) whether the commentator is willing to review drafts or otherwise assist in the preparation of the new code.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered the Second Supplement to Memorandum 97-5, relating to mediation confidentiality. Proposed Evidence Code Sections 1116 and 1117 should be replaced with a provision that reads substantially as follows:

> **§ 1116. Scope of chapter**
>
> 1116. (a) Except as provided in subdivision (b), this chapter applies to a mediation, regardless of whether participation in the mediation is voluntary, pursuant to an agreement, pursuant to order of a court or other adjudicative body, or otherwise.
>
> (b) This chapter does not apply to either of the following:
>
> (1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.
>
> (2) A settlement conference pursuant to Rule 222 of the California Rules of Court.
>
> (c) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

The Commission approved the following change in the conforming revision to Labor Code Section 65, which was implemented to eliminate the fiscal committee designation:

> 65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. ~~Records~~ Any decision or award arising out of an arbitration conducted pursuant to this section is a public record. Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. All other records of the department relating to labor disputes are confidential~~; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record~~.

STUDY K-410 – CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 97-10 and the revised staff draft tentative recommendation attached to Memorandum 97-10. The Commission approved the draft as a tentative recommendation, with the following revisions.

§ 1132. Protection of act of compromise

Section 1132 should be revised to refer to "a civil action, administrative adjudication, arbitration, or other noncriminal proceeding."

§ 1137. Sliding scale recovery agreement

Section 1137 should be redrafted to refer to Code of Civil Procedure Section 877.5.

§ 1138. Miscarriage of justice

Section 1138 should be deleted.

§ 1139. Least restrictive means

As suggested by the State Bar Litigation Section and State Bar Committee on Administration of Justice, the provision on least restrictive means should be

reworded. Section 1139(a) should refer to Evidence Code Section 352 or incorporate language from that section. In redrafting Section 1139(b), staff should examine standards for protective orders.

§ 1152. Payment of medical or other expenses

Section 1152 should be revised to read:

> 1152. Evidence of furnishing or offering or promising to pay medical, hospital, or ~~similar~~ other expenses occasioned by an injury is not admissible to prove liability for the injury.

Compromise Evidence in Criminal Action

A new provision, governing admissibility and discoverability of compromise evidence in a criminal action, should be added to the draft. It should be similar to Section 1132, but should include an exception for compromise efforts that amount to an obstruction of justice. The tentative recommendation should also include a severability clause.

Settlement Conference Pursuant to Rule 222 of Rules of Court

An appropriate Comment should explain that the provisions on confidentiality of settlement negotiations apply to a settlement conference pursuant to Rule 222 of the California Rules of Court.

STUDY K-501 – BEST EVIDENCE RULE

In connection with review of its legislative program, the Commission considered how to respond if asked to limit its bill on the best evidence rule to civil cases. The Commission was inclined not to take that approach.

STUDY L-659 – INHERITANCE BY FOSTER CHILD OR STEPCHILD

The Commission considered Memorandum 97-9 and attached staff draft of a tentative recommendation on *Inheritance by Foster Child or Stepchild*. The Commission approved the tentative recommendation for distribution for comment.

STUDY N-112 – ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES

The Commission considered the First Supplement to Memorandum 97-5, proposing clarifying amendments to SB 68 (Kopp). The Commission approved the amendments as set out in the memorandum.

STUDY N-116 – ADMINISTRATIVE ADJUDICATION: TELEPHONE HEARINGS

The Commission considered Memorandum 97-14 and its First Supplement together with a letter from the California Unemployment Insurance Appeals Board (copy attached to these Minutes as Exhibit p. 1), relating to telephone hearings.

The Commission approved a provision along the following lines for inclusion in pending administrative adjudication legislation:

> **Unemp. Ins. Code § 1953.5 (added). Telephone hearings:**
>
> 1953.5. The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means, notwithstanding a party's objection pursuant to Section 11440.30 of the Government Code, on a showing of good cause by the party requesting the hearing by telephone, television, or other electronic means.
>
> **Comment.** Good cause, within the meaning of Section 1953.5, may include circumstances where a party resides out of state or at a location distant from the hearing site and it is not practical for the party to appear in person, particularly where the amount in controversy is relatively small. However, the presiding officer may require the parties to appear in person if warranted by the circumstances of the case.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 97-11 and its First Supplement. The Commission made the following decisions:

§ 1121. Proceedings to which title does not apply

The Commission approved the staff recommendation to revise Section 1121 as follows:

> 1121. This title does not apply to any of the following:
>
> (a) Judicial review of agency action ~~provided by statute~~ by any of the following means:
>
> (1) ~~Trial~~ Where a statute provides for trial de novo.

(2) Action for refund of taxes or fees under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(3) Action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

….

(d) Judicial review of ~~an ordinance of a local agency~~. either of the following enacted by a county board of supervisors or city council:

(1) An ordinance or regulation.

(2) A resolution that is legislative in nature.

….

The Commission approved the draft Comment for Section 1121. The staff should include case law defining "legislative in nature."

In the exemption in subdivision (a)(2), the staff should add two sections in Division 1 of the Revenue and Taxation Code that provide for trial de novo — Sections 5140 and 5148 — unless there is a persuasive reason not to do so.

§ 1121.240. Agency action

The Commission revised Section 1121.240 as follows:

1121.240. "Agency action" means any of the following:

….

(c) An agency's performance of~~, or failure to perform~~, any other duty, function, or activity, discretionary or otherwise.

(d) An agency's failure to perform any duty, function, or activity, discretionary or otherwise, that the law requires to be performed or that would be an abuse of discretion if not performed.

The staff should add to the Comment a reference to Section 1123.110(b) (court may summarily decline to grant review if petition does not present substantial issue).

The staff should prepare a memorandum for the next meeting analyzing Herb Bolz' concern, expressed at the meeting, that Sections 1121.240(b), 1123.460, and others may change existing law on judicial review of state agency underground regulations, what sanctions are available (injunctive relief?), and whether the ripeness doctrine applies. See Exhibit pp. 2-6.

§ 1123.150. Proceeding not moot because penalty completed

The Commission approved the staff recommendation to revise Section 1123.150 as follows:

> 1123.150. A proceeding under this chapter is not made moot by satisfaction during the pendency of the proceeding of a penalty imposed by the agency ~~during the pendency of the proceeding~~.

§ 1123.240. Standing for review of decision in adjudicative proceeding

The Commission approved the staff recommendation to revise Section 1123.240 as follows:

> 1123.240. Notwithstanding ~~any other provision of this article~~ Sections 1123.220 and 1123.230, a person does not have standing to obtain judicial review of a decision in an adjudicative proceeding unless one of the following conditions is satisfied:
>
> (a) The person was a party to the proceeding.
>
> (b) The person was a participant in the proceeding , and (1) is either interested or the person's participation was authorized by statute or ordinance, or (2) the person has standing under Section 1123.230. This subdivision does not apply to judicial review of a proceeding under the formal hearing provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.
>
> ~~(c) The person has standing under Section 1123.230.~~

The staff should consider whether, in the first line of subdivision (b), "(1)" should precede "a participant in the proceeding."

§ 1123.420. Review of agency interpretation or application of law

The Commission revised Section 1123.420 substantially as follows:

> 1123.420. (a) The standard for judicial review of ~~the following issues~~ agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action:
>
> ~~(1) Whether the agency action, or the statute or regulation on which the agency action is based, is unconstitutional on its face or as applied.~~
>
> ~~(2) Whether the agency acted beyond the jurisdiction conferred by the constitution, a statute, or a regulation.~~
>
> ~~(3) Whether the agency has decided all issues requiring resolution.~~

~~(4) Whether the agency has erroneously interpreted the law~~.

~~(5) Whether the agency has erroneously applied the law to the facts~~.

(b) This section does not apply to interpretation ~~or application~~ of law by the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board within the regulatory authority of those agencies.

The substance of deleted paragraphs (1)-(4) should be put in the Comment as examples of what constitutes agency interpretation of law. The Comment should also say the draft statute does not provide a standard of review for application of law to fact, and that existing law remains unaffected. The Comment to Section 1123.160 (condition of relief) should be revised to eliminate the reference to the deleted material above.

The staff should consider whether to revisit the question of application of law to fact in a memorandum for a future meeting.

§ 1123.520. Superior court venue

The Commission approved the staff recommendation to revise Section 1123.520(a) as follows:

1123.520. (a) Except as otherwise provided by statute, the proper county for judicial review under this chapter is:

(1) In the case of state agency action, the county where the cause of action, or some part thereof, arose, or Sacramento County.

(2) In the case of action of a nongovernmental entity, the county where the entity is located.

(3) In cases not governed by paragraph (1) or (2), including local agency action, the county or counties of jurisdiction of the agency.

….

Comment. Subdivision (a)(1) of Section 1123.520 continues prior law for judicial review of state agency action, with the addition of Sacramento County. See Code Civ. Proc. § 393(1)(b); California Administrative Mandamus § 8.16, at 269 (Cal. Cont. Ed. Bar, 2d ed. 1989); Duval v. Contractors State License Bd., 125 Cal. App. 2d 532, 271 P.2d 194 (1954). Subdivision (a)(2) continues what appears to have been existing law for judicial review of action of a nongovernmental entity. See California Administrative Mandamus, *supra*, § 8.16, at 270.

Subdivision (a)(3) is new, but is probably not a substantive change for local agencies, since the cause of action is likely to arise in the county of the local agency's jurisdiction. In addition to applying to local agencies (defined in Section 1121.260), subdivision

(a)(3) applies to agencies that are neither state nor local. See, e.g., Gov't Code § 66801 (Tahoe Regional Planning Agency).

….

The venue rules of Section 1123.520 are subject to a conflicting or inconsistent statute applicable to a particular entity (Section 1121.110), such as Business and Professions Code Section 2019 (venue for proceedings against the Medical Board of California). For venue of judicial review of a decision of a private hospital board, see Health & Safety Code § 1339.63(b).

§ 1123.630. Time for filing petition for review in adjudication of agency other than local agency and formal adjudication of local agency

§ 1123.640. Time for filing petition for review in other adjudicative proceedings

The Commission approved the staff recommendation to revise Sections 1123.630 and 1123.640 as follows:

~~1123.630. In addition to any notice of agency action required by statute, in an adjudicative proceeding, the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless the time is extended as provided by law."~~

~~1123.640~~ 1123.630. (a) The petition for review of a decision of ~~a state~~ an agency , other than a local agency, in an adjudicative proceeding, and of a decision of ~~any~~ a local agency in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, shall be filed not later than 30 days after the decision is effective or after the notice required by ~~Section 1123.630~~ subdivision (e) is delivered, served, or mailed, whichever is later.

(b) For the purpose of this section:

(1) A decision in a proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code is effective at the time provided in Section 11519 of the Government Code.

(2) ~~A decision of a state agency in~~ In an adjudicative proceeding other than under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code , a decision of an agency other than a local agency is effective 30 days after it is delivered or mailed to the person to which the decision is directed, unless any of the following conditions is satisfied:

(A) Reconsideration is ordered within that time pursuant to express statute or rule.

(B) The agency orders that the decision is effective sooner.

(C) A different effective date is provided by statute or regulation.

(c) Subject to subdivision (d), the time for filing the petition for review is extended for a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute or rule.

(2) ~~If~~ Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record , and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910~~, until 30 days after the record is delivered to the party~~.

(d) In no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is effective.

(e) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision is [date] unless another statute provides a longer period or the time is extended as provided by law."

~~1123.650~~ 1123.640. (a) The petition for review of a decision in an adjudicative proceeding, other than a petition governed by Section ~~1123.640~~ 1123.630, shall be filed not later than 90 days after the decision is announced or after the notice required by ~~Section 1123.630~~ subdivision (d) is delivered, served, or mailed, whichever is later.

(b) Subject to subdivision (c), the time for filing the petition for review is extended for a party:

(1) During any period when the party is seeking reconsideration of the decision pursuant to express statute, rule, charter, or ordinance.

(2) ~~If~~ Until 30 days after the record is delivered to the party if, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record , and, within 15 days after being notified of the estimated fee and cost, pays the fee and cost provided in Section 1123.910~~, until 30 days after the record is delivered to the party~~.

(c) In no case shall a petition for review of a decision described in subdivision (a) be filed later than one hundred eighty days after the decision is announced or reconsideration is rejected, whichever is later.

> (d) In addition to any notice of agency action required by statute, in an adjudicative proceeding described in subdivision (a), the agency shall in the decision or otherwise give notice to the parties in substantially the following form: "The last day to file a petition with a court for review of the decision may be as early as 90 days after the decision is announced, or in the case of a decision pursuant to environmental laws, as early as 30 days after the required notice is filed."

The staff should consider whether the last line in Section 1123.640(d) above — "after the required notice is filed" — should be revised to read "after the time begins to run." The notice language appears to refer to the California Environmental Quality Act, which has been exempted from this section.

The Comment should refer to the provisions of the Code of Civil Procedure for calculating these time periods. See, e.g., Code Civ. Proc. §§ 12-12b.

§ 1123.820. Administrative record exclusive basis for judicial review

The Commission approved the staff recommendation to revise Section 1123.820 as follows:

> 1123.820. (a) Except as provided in subdivision (b), the administrative record for judicial review of agency action consists of all of the following:
>
> ….
>
> (7) Any other matter expressly prescribed for inclusion in the administrative record by rules of court adopted by the Judicial Council.

§ 1123.830. Preparation of record

The Commission revised subdivision (c) of, and added subdivision (d) to, Section 1123.830 as follows:

> (c) The time limits provided in subdivision (b) may be extended ~~by the court~~ for good cause shown by either or both of the following:
>
> (1) By the court for a reasonable period.
>
> (2) By the agency for a period not exceeding 190 days after the request and payment of the fee and cost provided in Section 1123.910. This paragraph does not apply to review of an adjudicative proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

> (d) If the agency fails timely to deliver the record, the court may order the agency to deliver the record, and may impose sanctions and grant other appropriate relief for failure to comply with any such order.

§ 1123.850. New evidence on judicial review

The Commission approved the staff recommendation to delete paragraph (2) from subdivision (c) of Section 1123.850:

> (c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case ~~in either of the following circumstances~~:
>
> ~~(1) No~~ if no hearing was held by the agency, and the court finds that remand to the agency would be unlikely to result in a better record for review and the interests of economy and efficiency would be served by receiving the evidence itself. This ~~paragraph~~ subdivision does not apply to judicial review of rulemaking.
>
> ~~(2) Judicial review is sought solely on the ground that agency action was taken pursuant to a statute or ordinance that is unconstitutional~~.

The staff should consider adding to the Comment cases, if there are any, involving a constitutional challenge where the court is authorized to take evidence directly as a matter of constitutional law.

Pub. Res. Code § 21168. Conduct of proceeding

The Commission approved the staff recommendation to restore the existing standard of review language to the California Environmental Quality Act, to read substantially as follows:

> In any such proceeding, the court shall not exercise its independent judgment on the evidence, but shall determine only whether the act or decision is supported by substantial evidence in light of the whole record.

STUDY N-300 – ADMINISTRATIVE RULEMAKING

The Commission considered Memorandum 97-12 and its First Supplement concerning interpretive guidelines. The Commission heard public comment on the issues raised by the memorandums, the substance of which is summarized below.

Professor Michael Asimow, Commission Consultant

Professor Asimow spoke on his own behalf. He noted that his views have been stated at length and in detail in articles and memoranda that are before the Commission.

In summary, agencies frequently must interpret the meaning of governing statutes or regulations in order to implement them. Everyone agrees that public participation is important, but agencies typically lack the resources to adopt interpretations through formal rulemaking procedures. It would be better for the regulated community to know an agency's interpretation than for the agency to keep that interpretation a secret. Therefore it makes sense to create an exception to detailed rulemaking procedures for purely interpretive agency guidelines. An interpretive guideline would have no force or effect of law.

Dugald Gillies, Sacramento Nexus

Mr. Gillies has experience as a lobbyist representing clients before administrative agencies. Mr. Gillies spoke on his own behalf.

Practical Effect. Interpretive guidelines have great practical effect, even if they have no legal effect, and should therefore be subject to adoption through formal rulemaking procedures.

An example of an interpretive guideline that has practical effect are the Guidelines for Unlicensed Assistants, distributed by the Department of Real Estate (Exhibit pp. 7-8). Despite their apparent invalidity as underground regulations, many in the regulated community rely on these guidelines in conducting their business.

The guidelines adopted were contrary to those recommended by the committee that heard public comment on the matter. Compliance with formal rulemaking procedure would have improved the result by requiring that the decision to adopt guidelines different from those recommended be explained.

Minor Matters. Some exception to rulemaking procedures might be useful for "minutiae," but should still be subject to public notice, followed by full rulemaking procedures if substantial public interest is expressed.

Any simplified procedures for interpretive guidelines should include a clear definition of matters that may not be adopted as interpretive guidelines (the approach taken in Washington state). Proposed draft language for such a definition was distributed (Exhibit p. 9).

Herb Bolz, Office of Administrative Law

Mr. Bolz spoke on behalf of the Office of Administrative Law.

Agency Adoption of Interpretive Guidelines. Each year more than 10,000 interpretive guidelines are adopted through formal rulemaking procedures as part of an integrated regulatory scheme. As a regulation requires additional interpretation over time an agency can revise its regulation through the rulemaking process.

Judicial Review. One critical feature of any exception for interpretive guidelines is the availability of judicial review to invalidate a rule that was improperly adopted as an interpretive guideline.

Gene Livingston, Livingston & Mattesich

Mr. Livingston has experience in rulemaking as the former head of the Employment Development Department and as the first director of the Office of Administrative Law. He currently represents private clients before regulatory agencies and assists agencies in compliance with rulemaking procedure. Mr. Livingston spoke on his own behalf.

Importance of Rulemaking Procedure. Historically, strict rulemaking procedures were adopted in reaction to a demonstrated tendency on the part of agencies to take the easiest path, to the detriment of public participation and rationalized process.

The regulated community in California is subject to enforcement by agencies and by the public through statutory private rights of action, such as action under Business & Professions Code Section 17200.

Despite agency claims to the contrary, rulemaking procedures are not unduly burdensome. Necessity review helps avoid arbitrary agency action and public participation legitimates the resulting rule, increasing voluntary compliance.

The Commission's experience with the public participation process demonstrates the value of public comment in agency decisionmaking.

No Bright Line Exists. All regulations are interpretations of law. For example, the statutory guidance to Cal-OSHA simply directs the standards board to adopt standards to protect the health and safety of workers. The standards board has adopted thousands of regulations interpreting that general instruction.

No bright line can be established between "big interpretations" and "little interpretations" for which full rulemaking procedures are unnecessary.

Force and Effect of Law. For two reasons, interpretive statements cannot be distinguished from rules simply by declaring that they have no force and effect of law.

First, because the regulated community will often comply with an interpretive statement out of fear that the agency or a member of the public will attempt to enforce the statement despite its nominal lack of legal force and effect. An interpretive statement therefore has de facto force and effect of law.

Second, because courts may defer to an agency interpretive statement despite its lack of legal force and effect. The Asimow-Ogden proposal suggests that courts give an interpretive statement deference in appropriate circumstances (e.g., where an interpretation is long standing or was adopted after careful consideration.) Courts may also use an interpretive statement to construe a statute to counter a defense of vagueness in a criminal prosecution. If a court may grant deference to an interpretive statement then the interpretive statement has actual legal force and effect.

Any proposed simplification of procedures for interpretive statements should expressly prohibit any enforcement of or deference to an interpretive statement.

Safe Harbor. A party who complies with an interpretive statement should not be subject to enforcement for violation of the statute that statement interprets. Many existing interpretive statements expressly declare that the agency is not bound by their terms, providing no estoppel against subsequent agency enforcement. Any proposal permitting interpretive statements should include a safe harbor provision preventing enforcement against those who comply with the interpretive statement.

Alternatives. The choice is not between simplified procedures for interpretive guidelines and agency secrecy as to its interpretations of law. A better alternative is to continue to require that agency interpretive statements be adopted through full rulemaking procedures.

Shannon Sutherland, California Nurses Association

Ms. Sutherland spoke on behalf of the California Nurses Association.

Practical Effect. Interpretive guidelines can be likened to "mom rules." Just as most teenage children comply with parental rules regardless of whether they are actually enforceable, members of the regulated community will often comply with unenforceable interpretive guidelines because of their apparent authority.

Interpretive guidelines therefore have great practical effect even if technically invalid.

Importance of Procedures. Agency expertise is often overstated. For example, health care regulators often have no current practical experience in the field. Health care is rapidly changing and practitioners are more aware than regulators of these changes. Education of the regulators is an important consequence of public participation.

Alternatives. The choice between agency secrecy and an exception to rulemaking procedures for interpretive guidelines is a false one. A third alternative is for agencies to adopt interpretive guidelines through the existing rulemaking procedure. Noncontroversial interpretations will receive little comment and the process will not be burdensome. Controversial interpretations will properly receive extensive public input, as they should.

Julie Miller, Southern California Edison

Ms. Miller spoke on behalf of Southern California Edison.

Brush-back Letters. An agency can often be dissuaded from attempting to enforce a harmful underground regulation by means of a "brush-back letter." A brush-back letter is a letter threatening to challenge the validity of an underground regulation in court.

Public Comment Period. Provision of a public comment period in rulemaking is not only important for the information it provides to the rulemaking agency. It also provides the regulated community with time to conform their practice to the pending regulation or to challenge its adoption before it becomes effective.

Publication of Interpretive Guidelines. Any proposed exception to rulemaking procedure for interpretive guidelines should require that interpretive guidelines be published electronically and through the Office of Administrative Law. Existing underground regulations of the Public Utilities Commission are distributed to the legislature only and are not generally available to the public.

Lucy Quacinella, Western Center on Law and Poverty

Ms. Quacinella spoke on behalf of the Western Center on Law and Poverty.

Importance of Public Participation. Public input is important because it educates regulators who may otherwise lack expertise in the subject to be regulated. For example, the Department of Health Services must implement the

transition from MediCal to managed care. The Department has little experience with managed care and can learn much through public comment by health care experts.

Dick Ratliff, California Energy Commission

Mr. Ratliff spoke on behalf of the California Energy Commission.

Scope of Underground Regulations. Underground regulations include a broad range of communications, including phone responses to a request for interpretation of a statute or regulation, formal and informal advice letters, and written interpretive guidelines. It is ironic that these are perceived as problematic because they are often in response to requests from regulated businesses seeking clarification of the law. An agency facing such a request must either adopt an underground regulation or remain silent.

Rulemaking Procedures Cumbersome. Formal rulemaking procedures are very cumbersome. To adopt a new building standard, unopposed by anyone, takes over three years. Non-building standard regulations don't take as long but the process is still slow. A recent statute provided the Energy Commission five months in which to implement the restructuring of the electrical industry. The Commission did so without regulations because regulations could not be adopted in the five-month statutory time frame.

Supports Proposal. Agencies must interpret the meaning of statutes and regulations on a regular basis. Regulatory language inevitably requires reinterpretation in the context of new facts and unforeseen circumstances. Agencies need to be able to communicate their interpretations to the regulated public.

☐ APPROVED AS SUBMITTED

☐ APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

_____
Date

_____
Chairperson

_____
Executive Secretary

STATE OF CALIFORNIA - GOVERNOR PETE WILSON
HEALTH AND WELFARE AGENCY
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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February 26, 1997

jjaletters/sterling 1953.5

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

Pursuant to our discussion of today, rather than amending Government Code Section 11440.30, we recommend that the provision be added to the Unemployment Insurance Code as follows:

1953.5 Notwithstanding Section 11440.30 of the Government Code, the presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means, notwithstanding a party's objection, on a showing of good cause.

Again we greatly appreciate your assistance in bringing this issue to a favorable resolution.

Very truly yours,

Juan O. Arcellana
Chief Administrative Law Judge, Field Operations

STATE OF CALIFORNIA
PETE WILSON, Governor

OFFICE OF ADMINISTRATIVE LAW
555 CAPITOL MALL, SUITE 1290
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Feb. 26, 1997

California Law Revision Commission
Att'n: Nat Sterling
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

AVOIDING DRAMATIC SETBACKS IN THE AREAS OF MEANINGFUL PUBLIC PARTICIPATION AND GOVERNMENTAL ACCOUNTABILITY (I.E., PRESERVING CITIZENS' RIGHTS TO ENFORCE STATUTORY NOTICE AND COMMENT REQUIREMENTS IN COURT)

Re: **Judicial Review of Agency Action**--Provisional Final Recommendation as downloaded Feb 21, 1997/ SB 209; **Administrative Rulemaking**

Commission Meeting of Feb. 27, 1997, State Capitol Room 2040, Sacramento--Special order of business at 1:00 p.m., re *Judicial Review of Agency Action* and *Administrative Rulemaking*

Dear Mr. Sterling:

For many decades, it has been a fundamental principle of administrative law that rules adopted by government agencies must undergo public notice and comment before they may legally be enforced. (Except for situations in which express statutory provisions have been enacted exempting specific matters from notice and comment rulemaking. See, for instance, Labor Code section 1185, originally adopted as Stats. 1949, c. 1454, p. 2538, sec. 12.)

If an agency issues or enforces a rule which should have gone through notice and comment--but did not--the courts will typically invalidate that rule on procedural grounds. For instance, *National Family Planning v. Sullivan* (D.C.

Cir. 1992) 979 F.2d 227 (construing federal Administrative Procedure Act (APA), court held that federal agency could not utilize challenged rule until and unless it was adopted after notice and comment); *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 737 (state agency required to follow California APA notice and comment procedures before it could utilize new rules implementing its enabling act).

The agency may also be ordered by the court to rescind or modify an administrative decision which had been based on an invalid rule. See, for instance, *Conroy v. Wolff* (1950) 34 Cal.2d 745; *Armistead v. State Personnel Board* (1978) 22 Cal.2d 200 (personnel actions based on invalid rules); *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 415 (court overruled state agency decision to deny highway construction funds to city because agency decision was based on rule which should have been, but was not, adopted as "a valid rule or regulation").

During the years that the Commission's administrative law study has been underway, the Office of Administrative Law has taken the position that existing rights of members of the public to file court challenges to both duly adopted and "underground" regulations should not be diminished. The fundamental feature of the longstanding judicial review system has been the typical sanctions: (1) invalidation of the challenged rule if found to be an "underground" regulation and (2) in appropriate circumstances, invalidating an agency decision based on the invalid rule. We write today to help avert a radical change in remedies available to the public.

Professor Michael Asimow, one of your academic consultants on administrative law, was kind enough to send me a copy of his December 27, 1996 letter to Bob Murphy of your staff, the person responsible for "judicial review of agency action." The letter concerns the December 19, 1996 decision of the California Supreme Court in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 59 Cal.Rptr.2d 186.

In a friend of the court brief filed with the Supreme Court, Professor Asimow criticized *Grier v. Kizer* (1990) 219 Cal.App.3d 422 (a case invalidating an agency decision on grounds it was based on a rule which should have been--but was not--adopted after notice and comment).[1] In a passage which is not a model of clarity, the *Tidewater* Court stated that it disapproved *Grier* to the extent that it holds otherwise than *Armistead*, which is described as having determined not to give weight to "an agency interpretation," but which

nonetheless "considered whether that interpretation was correct." 59 Cal.Rptr.2d at 198. In his December 27, 1996 letter to the Commission, Professor Asimow stated:

> "The Court also held that the *only sanction* for failure to comply with the [Administrative Procedure Act] is *that the court will not defer to invalidly adopted interpretation[s]*. . . . That holding also changes prior law, overruling the unfortunate decision in Grier v. Kizer, 219 CA3d 433 (1990). . . . [T]his holding should be codified." (Emphasis added.)

This is a truly terrible policy proposal, that would be a great step backward for California government.

Professor Asimow's recommendation, as we understand it, is that the ***only*** judicial sanction for agency failure to comply with the APA should be to give "less weight" to the agency policy. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA Law Review 1157, 1196, cited in paragraph two of the official comment to proposed Code of Civil Procedure section 1123.240. The cited article pages concern deference factor (6) as listed in the comment; the comment outlines the intent underlying 1123.240(a)(4).

Professor Asimow's recommendation would apparently eliminate **both** of the two meaningful sanctions presently available to the courts, when confronted with an alleged underground regulation. First, the courts would be forbidden to enjoin a state agency from utilizing an underground regulation until completion of statutory notice and comment procedures, no matter how profoundly it might impact the public. Second, the courts would be forbidden to invalidate agency decisions based on underground regulations, no matter how substantive the rule, no matter how extreme the situation.

We object. This looks to us like a technique for bringing key elements of the *federal* interpretive exception into California law through the back door. With critical differences: under federal law--as reflected in the *Sullivan* case (cited above)--the courts clearly have the power to enjoin an underground regulation until it is put through the notice and comment process. Similarly, our initial research indicates that "the usual remedy when an agency rule has been invalidated" by a federal court is an order reversing any agency decisions based upon the invalidated rule. See, for instance,*National Treasury Employees Union v. Newman* (D.D.C. 1991) 768 F.Supp. 8, 13 (since neither party desired return

to *status quo ante*, court ordered notice and comment to proceed, but did not undo agency decisions based upon the invalidated rules).

In short, citizen, local government, business, environmental and other advocacy groups in California would be dramatically disadvantaged. Along this line, we question whether the Asimow proposal is consistent with the regulatory reform policies reflected in Executive Order W-144-97, which among other things directs state agencies to provide the public with additional notice concerning planned rulemaking projects and to carefully consider the impact of regulatory policies on regulated communities, local governments, and consumers.

We are concerned that it may not be sufficient for the Commission simply to decline to *add* to the judicial review proposal the express textual provisions requested by Professor Asimow. It may be that the current unrevised draft has already moved substantially in that direction. Primary attention has thus far been given to judicial review of adjudicatory decisions and of duly adopted regulations. Little attention has been given to judicial review of state agency underground regulations. Also, there are numerous citations to Professor Asimow's articles in the comments; in those articles, there are citations to his earlier articles. He has been consistent in his conviction that, for instance, the *Grier* case was wrongly decided.

We are particularly concerned about sections 1123.420, 1123.460, and Government Code section 11350. We have not been able, in the time available, to develop the new and revised language that would be needed to preserve the status quo. Our objective is clear, however: to maintain the status quo of the past 25 years. That is, courts should continue to be able to (1) enjoin state agencies from utilizing underground regulations until notice and comment procedures have been completed and (2) order state agencies to undo or redo decisions made on the basis of invalidated underground regulations.

At this point, we recommend that the Commission decide to retain the status quo in these areas. The specific method for accomplishing this objective can be worked out. If necessary, it may be possible to simply exempt all judicial review of state agency underground regulations from the proposal for the time being, drafting just enough language to ensure preservation of the status quo. We have tried to develop language modifying the three specific sections listed above, but have not been able to come up with satisfactory material. Other areas, including standing and ripeness, may need work. Also, it important that we have time to read through the total proposal, including comments, and law

review citations, to ensure that the proposal does not have the cumulative effect of incorporating by reference the regressive policies about which we are so deeply concerned.

Adopting the changes suggested by Professor Asimow could lead to dramatic setbacks in the areas of meaningful public participation and governmental accountability. **We urge you to reject these changes and to preserve citizens' rights to enforce statutory notice and comment requirements in court.**

Professor Asimow's suggested changes to judicial review policies really concern the issue of whether or not California should enact some version of the federal interpretive guideline exception from notice and comment requirements. Maybe enacting an exception is a good idea. In any event, the suggested changes should be noticed widely and discussed in detail as part of the "administrative rulemaking" phase of the study.

Thank you for considering our comments.

Sincerely,

Herbert F. Bolz

1. The brief urged the Court to find that "interpretive guidelines" were exempt from public notice and comment under the California APA. If the court rejects this suggestion, the brief continues at p. 14,

> "it should at least restrict the remedies available in case an agency has adopted an invalid underground regulation. As in *Armistead*, the only effect should be that a court accords *no deference* to an invalidly adopted underground regulation. The court should not presume that the underground regulation is incorrect. And it should not invalidate agency action taken in reliance on an invalidly adopted guidance document as the Court of Appeal erroneously did in *Grier*. 44 Admin. L. Rev.at 76 **[p. 34 of attachment to Commission Memorandum 97-12]**. . . .

Commissioner's Message

Almost two years ago, at the urging of the real estate industry, we established a task force comprised of industry representatives and Department of Real Estate staff to discuss the question of unlicensed activity and the use of unlicensed assistants.

There have long been questions in the minds of licensees as to what exactly constitutes activity which requires a real estate license. Basically, a real estate license is required by California law if a person is soliciting or negotiating on behalf of another for compensation with respect to a real property transaction. The concern is that unlicensed persons who assist licensees in their business do not inadvertently "step over the line" and violate the Real Estate Law and thus implicate the licensee, or, worse, harm the public.

The task force met on numerous occasions over almost a year, and developed a proposed set of guidelines for my review. After careful consideration, the following represents the Department of Real Estate's official version of the Guidelines for Unlicensed Assistants. These guidelines are intended to assist licensees in the various areas described and will be re-evaluated within the next twelve months to determine their effectiveness and whether revisions are needed. We encourage all licensees to familiarize themselves with the guidelines and, during the course of the next year, communicate their thoughts to the Department as to the effectiveness of the guidelines.

Clark Wallace

Guidelines For Unlicensed Assistants*

Preamble

The designated officer of a corporation is explicitly responsible for the supervision and control of the activities conducted on behalf of a corporate broker by its officers and employees as necessary to secure full compliance with the Real Estate Law, including but not limited to the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required. It is inherent with respect to individuals engaging in business as a real estate broker that they are also similarly charged with the responsibility to supervise and control all activities performed by their employees and agents in their name during the course of a transaction for which a real estate license is required, whether or not the activities performed require a real estate license.

To assist brokers and designated broker/officers to properly carry out their duty to supervise and control activities conducted on their behalf during the course of a licensed transaction, it is important for the broker to know and identify those activities which do and do not require a real estate license. This knowledge assists the broker to use licensed persons when required, and to extend and provide the necessary quantum of supervision and control over licensed and nonlicensed activities as required by law and good business practices.

Identifying licensed activities has become difficult for many brokers as brokerage practices have changed and evolved in response to new laws, the need for new efficiencies in response to consumer demands, and new technology. The following is a guideline, and nothing more, of defined activities which generally do not come within the term "real estate broker", when performed with the broker's knowledge and consent. Broker knowledge and consent is a prerequisite to the performance of these unlicensed activities, since without these elements there can be no reasonable assurance that the activities performed will be limited as set forth below.

Cold Calling

Making telephone calls to canvass for interest in using the services of a real estate broker. Should the person answering the call indicate an interest in using the services of a broker, or if there is an interest in ascertaining the kind of services a broker can provide, the person answering shall be referred to a licensee, or an appointment may be scheduled to enable him or her to meet with a broker or an associate licensee** (licensee***). At no time may the caller attempt to induce the person being called to use a broker's services. The canvassing may only be used to develop general information about the interest of the person answering and may not be used, designed or structured for solicitation purposes with respect to a specific property, transaction or product. (The term "solicitation" as used herein should be given its broadest interpretation.)

Open House

With the principal's consent, assisting licensees at an open house intended for the public by placing signs, greeting the public, providing factual information from or handing out preprinted materials prepared by or reviewed and approved for use by the licensee, or arranging appointments with the licensee. During the holding of an open house, only a licensee may engage in the following: show or exhibit the property, discuss terms and conditions of a possible sale, discuss other features of the property, such as its location, neighborhood or schools, or engage in any other conduct which is used, designed or structured for solicitation purposes with respect to the property.

Comparative Market Analysis

Making, conducting or preparing a comparative market analysis subject to the approval of and for use by the licensee.

Guidelines, *continued on page 10*

Guidelines

continued from page 3

Communicating With the Public

Providing factual information to others from writings prepared by the licensee. A non-licensee may not communicate with the public in a manner which is used, designed or structured for solicitation purposes with respect to a specific property, transaction or product.

Arranging Appointments

Making or scheduling appointments for licensees to meet with a principal or party to the transaction. As directed by the licensee to whom the broker has delegated such authority, arranging for and ordering reports and services from a third party in connection with the transaction, or for the provision of services in connection with the transaction, such as a pest control inspection and report, a roof inspection and report, a title inspection and/or a preliminary report, an appraisal and report, a credit check and report, or repair or other work to be performed to the property as a part of the sale.

Access to Property

With the principal's consent, being present to let into the property a person who is either to inspect a portion or all of the property for the purpose of preparing a report or issuing a clearance, or who is to perform repair work or other work to the property in connection with the transaction. Information about the real property which is needed by the person making the inspection for the purpose of completing his or her report must be provided by the broker or associate licensee, unless it comes from a data sheet prepared by the broker, associate licensee or principal, and that fact is made clear to the person requesting the information.

Advertising

Preparing and designing advertising relating to the transaction for which the broker was employed, if the advertising is reviewed and approved by the broker or associate licensee prior to its publication.

Preparation of Documents

Preparing and completing documents and instruments under the supervision and direction of the licensee if the final documents or instruments will be or have been reviewed or approved by the licensee prior to the documents or instruments being presented, given or delivered to a principal or party to the transaction.

Delivery and Signing Documents

Mailing, delivering, picking up, or arranging the mailing, delivery, or picking up of documents or instruments related to the transaction, including obtaining signatures to the documents or instruments from principals, parties or service providers in connection with the transaction. Such activity shall not include a discussion of the content, relevance, importance or significance of the document, or instrument or any portion thereof, with a principal or party to the transaction.

Trust Funds

Accepting, accounting for or providing a receipt for trust funds received from a principal or a party to the transaction.

Communicating With Principals, etc.

Communicating with a principal, party or service provider in connection with a transaction about when reports or other information needed concerning any aspect of the transaction will be delivered, or when certain services will be performed or completed, or if the services have been completed.

Document Review

Reviewing, as instructed by the licensee, transaction documentation for completeness or compliance, providing the final determination as to completeness or compliance is made by the broker or associate licensee.

Reviewing transaction documentation for the purpose of making recommendations to the broker on a course of action with respect to the transaction.

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* These "Guidelines", when strictly followed, will assist licensees and their employees to comply with the license requirements of the Real Estate Law. They present specific scenarios which allow brokers to organize their business practices in a manner that will contribute to compliance with the Real Estate Law. As such, they were drafted to serve the interests of both licensees and the public they serve. Nothing in them is intended to limit, add to or supersede any provision of law relating to the duties and obligations of real estate licensees, the consequences of violations of law or licensing requirements.

Licensees should take heed that because of the limiting nature of guidelines, as opposed to a statute or regulation, that they will not bind or obligate, nor are they intended to bind and obligate courts or others to follow or adhere to their provisions in civil proceedings or litigation involving conduct for which a real estate license may or may not be required.

Brokers and others who may refer to these "Guidelines" from time to time should be aware that it does not take very much to go from unlicensed to licensed activity. For example, it is a commonly held belief and understanding among licensees and others that participation in "negotiations" is somehow limited to the actual bargaining over terms and conditions of a sale or loan, when in fact the courts in this state have given much broader application to this term to include activity which may directly assist or aid in the negotiations or closing of a transaction.

** The term "associate licensee" means and refers to either a salesperson employed by the listing or selling broker in the transaction, or a broker who has entered into a written contract with a broker to act as the broker's agent in transactions requiring a real estate license.

*** Hereafter, the term "licensee" means "broker" or "associate licensee".

SACRAMENTO NEXUS

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Proposed Modification of Washington State Definition of Administrative Rule

(a) "Rule" means any agency order, directive, or regulation of general applicability otherwise consistent with the statute

(1) the violation of which subjects a person to a penalty or administrative sanction;

(2) which establishes, alters, or revokes any procedure, practice or requirement relating to agency hearings;

(3) which establishes, alters or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law;

(4) which defines, establishes, alters or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, occupation, or profession, or permission for the use of real property, or conditions thereon;

(5) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale;

(6) which imposes any tax, fee or charge of more than nominal amount, or increases any such levy by 20% or more;

or (7) which is an integral part of a comprehensive package which includes provisions described in subsections (1) to (6), or any of these.

(b) This section does not of itself create any authority for the adoption of any rule.

2-27-97